

1. Did the Judge exceed her authority by awarding claimant temporary partial disability benefits?
2. Should the Board modify the June 18, 2004 Order to award claimant temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes this appeal should be reversed.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing findings is limited to the following issues:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of the worker's employment?
- (3) Did the worker provide the employer with timely notice of the accidental injury and timely written claim for workers compensation benefits?
- (4) Has the employer established a defense that defeats the claim?¹

Additionally, the Board is charged with reviewing those preliminary hearing orders where the judge has exceeded his or her jurisdiction or authority in granting or denying the relief requested.² Accordingly, the Board has jurisdiction to review the June 18, 2004 Order.

Respondent contends the Judge exceeded her jurisdiction by awarding claimant temporary partial disability benefits for a scheduled injury. In this case, claimant alleges injury to his left hand. K.S.A. 44-510d(a)(11) addresses the loss of a hand and K.S.A. 44-510d(a)(12) addresses the loss of a forearm. And subsection (b) of that same statute states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same **shall be exclusive** of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, **and no additional compensation shall** be allowable or payable **for any temporary** or permanent, partial or total disability . . . (Emphasis added.)

¹ K.S.A. 44-534a(a)(2).

² K.S.A. 2003 Supp. 44-551(b)(2)(A).

Respondent contends that K.S.A. 44-510d makes it clear that temporary partial disability compensation is not to be awarded in scheduled injury cases. The Board agrees. This position is further supported by the language in K.S.A. 44-510e that specifically provides for temporary partial disability compensation only in cases of “temporary or permanent partial general disability not covered by such schedule.” K.S.A. 44-510e also contains the language or formula for calculating temporary partial disability compensation. No such language appears in K.S.A. 44-510d, the “scheduled injury” statute.³

Where a statute is clear and unambiguous, the court must give effect to the legislative intent expressed therein rather than make a determination of what the law should or should not be. *In re Appeal of News Publishing Co.*, 12 Kan. App. 2d 328, 743 P.2d 559 (1987); *State ex rel. Stephan v. Board of Seward County Comm’rs*, 254 Kan. 446, 866 P.2d 1024 (1994).

As claimant’s right to compensation is controlled by K.S.A. 44-510d, claimant is not entitled to receive temporary partial disability compensation.

Claimant requests the Board to reconsider the evidence and grant him temporary total disability benefits. The Board, however, does not have jurisdiction in appeals from preliminary hearing orders to determine if a worker meets the definition of temporary total disability. But claimant may reserve that issue for the time of final award. As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, the Board reverses the June 18, 2004 Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

c: Gerald O. Schultz, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ *Ledbetter v. Constar Plastics*, No. 205,252, 1996 WL 670520 (Kan. WCAB Oct. 2, 1996); *Mitchell v. Wal-Mart*, No. 264,567, 2001 WL 893620 (Kan. WCAB July 27, 2001).

⁴ K.S.A. 44-534a(a)(2).